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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CARL RENEZEDER et al., Plaintiffs and Appellants, v. EMERALD BAY COMMUNITY ASSOCIATION et al., Defendants and Respondents; ED GOTSCHALL et al., Interveners and Appellants.	G040657 & G041353 (Super. Ct. No. 07CC09914) O P I N I O N

Appeals from a judgment and postjudgment order of the Superior Court of Orange County, Kirk Nakamura, Judge. Judgment affirmed. Postjudgment order reversed and remanded with directions.

Gatzke Dillon & Balance, Mark J. Dillon, Anthony T. Ditty, and Jamie Q. Baldwin for Plaintiffs and Appellants Carl Renezeder and Kelley Renezeder.

Cane, Walker & Harkins, James C. Harkins, IV; Manning & Marder, Kass, Ellrod, Ramirez, Fredric W. Trester, and David J. Wilson for Defendants and Respondents Emerald Bay Community Association and Board of Directors of the Emerald Bay Community Association.

Gaines & Stacey, Sherman L. Stacey, and Nanci S. Stacey for Interveners and Appellants Ed Gotschall and Susan Gotschall.

Wesierski & Zurek and Joseph E. DuBois for Intervener and Appellant Richard J. Filanc, Jr.

* * *

Plaintiffs Carl and Kelley Renezeder filed a declaratory relief action against Emerald Bay Community Association and its board of directors (collectively, the Association). The Renezeders sought a judicial declaration that the Association's recorded declaration of covenants, conditions, and restrictions (CC&R's) and applicable implementing regulations "prohibit the splitting of lots (directly or indirectly through lot line adjustments) and the construction of more than one single family residence on any Lot within the development . . . ." This action was prompted by the Renezeders' next door neighbors dividing their property in two and selling one of the two properties, and the Association taking the position it was unable to prevent the division of certain properties and the construction of new single family residences on such newly subdivided properties.

The court ruled in favor of the Association and we affirm. The CC&R's clearly prohibit the construction of more than one single family residence per "Lot" or

"Parcel."[1] But the CC&R's do not bar Association members from splitting their properties and building one single family residence on each of the newly created "Parcels," *if* such Association member is able under applicable law to successfully split a property and thereby create two new separate "Parcels."

We reverse the court's postjudgment order denying attorney fees to the interveners (property owners who are attempting to build new single family residences on subdivided properties). The interveners were prevailing parties under Civil Code section 1354, subdivision (c).[2]

FACTS

The Applicable CC&R's

The Association's applicable CC&R's were recorded in 1985. The CC&R's indicate "[a]ll of the Provisions . . . shall be liberally construed together to promote and effectuate the fundamental concepts as set forth herein."

The CC&R's definitions of the words "Lot" and "Parcel" are important in interpreting the specific substantive provisions of the CC&R's at issue. "Lot [¶] shall mean a Lot so designated by number as shown on the original Tract Map recorded in the office of the County Recorder." "Parcel [¶] shall mean a Parcel so designated as shown on the original Tract Map recorded in the office of the County Recorder legally described by metes and bounds, and/or a Parcel legally created in accordance with the Subdivision Map Act of the State of California."

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[1] "Lot" and "Parcel" are defined terms in the Association's CC&R's. When not discussing these defined terms, we will refer to individually owned units as "properties" to minimize confusion.

[2] All statutory references are to the Civil Code, unless referenced otherwise.

Article III, section 2 of the CC&R's provides in relevant part: "All Lots and Parcels . . . shall be used and occupied only for private residential purposes to accommodate only one private Single Family. Single Family use means that only one Family may use and occupy said property during the period of ownership by said Family, except for approved Tenants, guests and servants of the Family. Multiple occupancy, whether by several families or by any concept of 'sharing,' is expressly excluded from the term 'Single Family' and prohibited by the provisions of this restriction. This restriction is basic and essential to the preservation of the community of Emerald Bay as intended at the outset and at the present time. No variance or deviation from this concept shall be permitted by the Association or on behalf of the Association."

Schedule A of the CC&R's provides, in relevant part: "Improvements to each Lot or Parcel in said Tract are restricted to one private Single Family residence and garage . . . ." Schedule A allows an exception to this rule for lot 9 (which is not one of the properties at issue in this case): "Two private Single Family residences, but not more than two, otherwise in compliance with the terms of this Master Declaration, may be erected and maintained on Lot 9, if located" in accordance with particular requirements. Schedule A also authorizes the construction of cabanas on certain lots (none of which are at issue here), including lot 23, but thereafter provides "[n]othing herein shall be deemed to approve or permit the division of Lot 23 into more than one residential site, or the erection of more than one Single Family private residence on said Lot."

Article VIII, section 1 provides: "No Structure of any kind shall be erected or maintained on any Lot or Parcel in this Tract, unless and until detailed plans and specifications for such Structure have been approved in advance, in writing, by the Board of Directors of the Association as hereinafter provided, and the construction completed in accordance therewith." Schedule A sets forth several specific building requirements. For instance, all structures, other than fences and walls, must be set back "five feet from all

adjacent Lot or Parcel boundaries." Further, no structure may "exceed 40% coverage of the Lot or Parcel upon which it is built."

Operating Rule Created in 1991

"The Association is vested with general power and authority to govern the business and affairs of the Association and all property within the jurisdiction of the Association . . . ." Included among the Association's powers is the authority to "adopt and amend from time to time rules and regulations to establish policies and guidelines for the effective implementation of these restrictions, Articles of Incorporation and By-laws for the benefit of all Members of the Association."

On April 2, 1991, the board of directors approved an amendment to the Association's architectural rules and regulations. The amendment stated: "Neither the Architectural Committee nor the Board of Directors shall have authority to approve plans for more than one residence on each existing lot or existing parcel. No division of a lot or parcel shall be permitted which would create a new lot or parcel for the purpose of constructing a residence thereon, or for any other purpose."

The apparent catalyst for this amendment to the architectural regulations was a dispute between the Association and a property owner, Mike McCaffrey, who had unsuccessfully petitioned the Association (beginning in 1990 and continuing through 1991) for approval of his plan to subdivide his land. In March 1991, the Association received a legal opinion letter from outside counsel stating McCaffrey would likely win at trial in a lawsuit against the Association, in part because there was no provision in the applicable CC&R's to prevent splitting a property. McCaffrey sued the Association in Orange County Superior Court in August 1991. Ultimately, even though it had enacted its amended architectural regulation in April 1991, the Association agreed that if McCaffrey could succeed in obtaining county approval for his plan, it would allow the

newly created properties to "go through the regular architectural process set forth in the Amended Master Declaration of Restrictions."

Relevant Properties[3]

The Renezeders are the owners of 105 Emerald Bay in the Emerald Bay community. The Renezeder property is large in comparison with most of the Emerald Bay properties. On the "plat map," the Renezeder property consists of lot 49, lot 50, and one-half of lot 48. Most of the surrounding Emerald Bay properties consist of a single lot on the plat map.

Next door to the Renezeder property is, presently, 107 Emerald Bay, owned in trust by interveners Ed and Susan Gotschall. The Gotschall property consists of one-half of lot 48 and a portion of lot 47. The remainder of lot 47 is now 109 Emerald Bay, which is owned by a person(s) named Toomas.

The Gotschall property was created in 2006. Prior to 2006, a single property deemed 109 Emerald Bay was next to the Renezeder property; it consisted of the entirety of lot 47 (a particularly large lot) and one-half of lot 48. The County of Orange approved the recording of Parcel Map 2005-113 on November 13, 2006, which split one property (the old 109 Emerald Bay) into two roughly equal properties (the new 109 Emerald Bay and 107 Emerald Bay). The Gotschalls applied to the Association for approval of the construction of a new home at 107 Emerald Bay; the request initially depicted the subdivision of land as a "lot line adjustment" rather than what it actually was — the subdivision of property. Several neighbors, including the Renezeders, objected to this request. The Gotschalls received preliminary approval from the

[3] We have attached as an appendix to our opinion two very useful "plat maps" submitted by the Renezeders with their opening brief. The maps illustrate the "pre-split" and "post-split" property lines of one of the properties at issue, as well as the size of the surrounding properties.

Association architectural committee in September 2007. The board approved the design in October 2007.

Intervener Richard J. Filanc, Jr., owns (in trust) 260 Emerald Bay, which is not depicted in the appendix. On March 6, 2007, the Association granted a variance request submitted by Filanc to divide his property into two properties for the purpose of building a second single family residence on the newly created property.

In June 2007, the board rescinded the 1991 architectural regulation. The resolution taking this action stated in relevant part: "Based on the consistent advice of counsel, the Board finds that the Filances, the Gotschalls and the Toomas have the right under the CC&Rs to adjust the size of their Parcels, or subdivide their Parcels, with the effect of allowing two homes where once only one stood. . . . [¶] Essentially, the . . . Association's general rule-making authority is considered in the context of, and is limited by, the classes of topics set forth in the architectural provisions of the CC&Rs, none of which presently include authority to restrict subdivision of a lot. This omission, coupled with the fact that the Association has permitted subdivision of other lots in the past, results in the architectural rule prohibiting lot splits as being unenforceable and inconsistent with the Association's CC&Rs and exceeding the Board's rule-making jurisdiction under . . . sections 1357.100 *et seq*."

Renezeders' Lawsuit

In September 2007, the Renezeders filed this lawsuit. The sole cause of action in the complaint is for declaratory relief against the Association (Emerald Bay and the board are the only named defendants). The Renezeders pray for relief as follows: "1. For a declaration that the CC&Rs . . . prohibit the splitting of lots . . . and the construction of more than one single family residence on any Lot within the development . . . ; [¶] 2. For a declaration that the provisions in the Architectural Regulations prohibiting lot splits are consistent with the CC&Rs, were properly adopted by the Board in 1991, and are

enforceable; [¶] 3. For an order directing the Board and the Association to reinstate the provisions in the Architectural Regulations which prohibit lot splits; [¶] 4. For . . . injunctive relief to prevent the Board or the Association from approving construction of any residences on lots purportedly created in violation of the CC&Rs and Architectural Regulations . . . ."

The Association filed a cross-complaint for declaratory relief, which, in essence, asked for precisely the opposite judicial determinations (in addition to a determination that the board had the authority to grant variances from compliance with its architectural regulations). Upon the parties' stipulation, the court found good cause to allow both the Gotschalls and Filanc to file complaints-in-intervention opposing the Renezeders' action.

Decision of the Court

The court signed its statement of decision in May 2008, in which it confirmed its tentative decision to rule against the Renezeders. There were five grounds listed for the court's decision. First, the 1985 amended declaration of CC&R's did not prohibit the lawful creation of new "Parcels" under the Subdivision Map Act (Gov. Code, § 66410). Second, the architectural regulation purporting to prohibit division of lots or parcels was unenforceable under California law because it was inconsistent with the CC&R's. Third, the board of directors was not authorized by the CC&R's to adopt regulations prohibiting the creation of new parcels in accordance with the Subdivision Act. Fourth, the 1991 architectural regulation was not an equitable servitude.[4] Fifth and finally, the board acted within its authority when it rescinded the 1991 architectural regulation.

[4] The Renezeders do not argue on appeal that the 1991 architectural regulation was an equitable servitude and we therefore do not address this issue.

The court entered judgment in favor of the Association, Gotschall, and Filanc, and deemed each to be a "prevailing party." Included amongst the court's statements in the judgment was the following declaratory relief: "That the Gotschall property . . . is a Parcel under the Declaration; and that upon recording a final map in accordance with the Subdivision Map Act, the Filanc property will be two 'Parcels.' Each of these 'Parcels' were legally created in accordance with the Subdivision Map Act and are permitted under the Declaration to single family use and occupancy."

Amendment of CC&R's

The Association requests this court to take judicial notice of an alleged amendment to its CC&R's in 2009 as follows: "From and after the effective date of this provision, no Member or owner of a Lot, Parcel, or real property fee interest shall: [¶] (i) partition or further subdivide his/her Lot, Parcel, or real property fee interest in a manner that could result in an increase in the number of Lots, Parcels, or real property fee interests; or [¶] (ii) adjust the property lines of a Lot, Parcel, or real property fee interest in a manner that could result in an increase in the number of Single Family residences that could be developed upon the affected Lot(s), Parcel(s), or real property fee interest(s). [¶] This provision shall not apply to any Lot, Parcel, or other real property fee interest Association owns. The intent of this provision generally includes, without limitation, a purpose to restrict the number of residences that may be built on the properties and maintain a lower density character in the Emerald Bay community."

DISCUSSION

There are two appeals before us. First, the Renezeders appeal the court's ruling against their declaratory relief cause of action, claiming the CC&R's and/or the 1991 architectural regulation disallow any lot or parcel splits for the purpose of

constructing a new single family residence within Emerald Bay. Second, the interveners (the Gotschalls and Filanc) appeal the court's decision to not award them attorney fees.

Mootness

Before reaching the merits of the parties' appeals, we first must address the Association's argument that the Renezeders' action for declaratory relief is moot because of the 2009 amendment to the CC&R's. The Association attempts to bring this amendment into the appellate record through a request for judicial notice. It is appropriate to take judicial notice of the contents of this amendment and the fact that the amendment was recorded as part of Emerald Bay's CC&R's. (See Evid. Code, § 452, subd. (c); *Cal-American Income Property Fund II v. County of Los Angeles* (1989) 208 Cal.App.3d 109, 112 fn. 2 [taking judicial notice of recordation of trust deeds].) As the Renezeders do not contest the authenticity of the certified copy of the document submitted to this court (which includes the seal of the County Clerk-Recorder), we take judicial notice that such an amendment to Emerald Bay's CC&R's has been recorded.[5]

The Renezeders' prayer for relief requests a judicial determination that the pre-amendment CC&R's preclude members from dividing properties to build additional residences and that the 1991 architectural regulation (which clearly stated such a rule) was consistent with the CC&R's. It seems these two requests for relief are moot. No prospective relief can issue from such determinations because the Association has amended its CC&R's to enact, clearly and unambiguously, the policy advocated by the Renezeders. Similarly, to order the Association to reinstate its 1991 architectural regulation (the Renezeders' third request for relief) would have no practical impact going forward; the CC&R's are now clear in banning future attempts by members to divide

[5] We also grant the Gotschalls' request we take judicial notice of various California Coastal Commission documents pertaining to their efforts to obtain approval for the construction of a residence on their property.

properties and build multiple single family residences on each of the subdivided properties.

Ultimately, however, this appeal is not moot. First, attorney fees are still at issue. If the court erred in its interpretation of the CC&R's, the judgment should have been entered in favor of the Renezeders; the Renezeders, rather than the Association, would then have been entitled to attorney fees. (See *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1751 ["Because the award of attorney fees depends on the propriety of the trial court's ruling on the merits of the action, the appeal is not moot"].) The interveners' appeal with regard to attorney fees is also a live issue.

Second, the Renezeders' complaint also requested injunctive relief preventing the Association "from approving construction of any residences on lots purportedly created in violation of the CC&Rs and Architectural Regulations provisions prohibiting lot splits." It appears the 2009 amendment to the CC&R's does not apply to in the Gotschalls and Filanc, whose properties were approved for division prior to the amendment. The 2009 amendment only prohibits further subdivisions of property after its effective date; it does not prohibit the construction of residences on properties previously split "in violation" of the pre-2009 CC&R's. The record is unclear, but it appears the Gotschalls and Filanc have still not constructed residences on their properties, and thus the Renezeders' request for injunctive relief is not moot.

Interpretation of CC&R's and 1991 Architectural Regulation

The CC&R's at issue in this case are included within a document entitled "Amended Master Declaration of Restrictions," which was recorded in September 1985. "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." (§ 1354, subd. (a).)

Also at issue is the 1991 architectural regulation purporting to bar any division of a lot or parcel. This is an "[o]perating rule," which "means a regulation adopted by the board of directors of the association that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association." (§ 1357.100.) "An operating rule is valid and enforceable only if all of the following requirements are satisfied: (a) The rule is in writing. [¶] (b) The rule is within the authority of the board of directors of the association conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association. [¶] (c) The rule is not inconsistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association. [¶] (d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article. [¶] (e) The rule is reasonable." (§ 1357.110.)

Thus, the foundational inquiry in this case is whether the 1991 architectural regulation (which states no new single family residences could be built on a new property created by splitting what was previously a single property) is consistent with and/or authorized by the CC&R's. Put another way, was the Association correct when it concluded it did not have the authority under the CC&R's to stop the Gotschalls and Filanc from building a new single family residence on new, legally subdivided properties?

We independently interpret the CC&R's. (*White v. Dorfman* (1981) 116 Cal.App.3d 892, 897.) CC&R's "must be 'construed as a whole' so as 'to give effect to every part thereof [citations], and particular words or clauses must be subordinated to general intent.'" (*Ezer v. Fuchsloch* (1979) 99 Cal.App.3d 849, 861.) "As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit." (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730

(*Ticor*).) Extrinsic evidence cannot "change the patent language of the [CC&R's]." (*White v. Dorfman, supra*, 116 Cal.App.3d at p. 899.)

But "[t]he CC&Rs, enacted for the mutual benefit of all Emerald Bay homeowners, are 'to be interpreted so as to give effect to the main purpose of the contract . . . [and] where a contract is susceptible of two interpretations, the courts shall give it such a construction as will make it lawful, operative, definite, reasonable and capable of being carried into effect [Civ. Code, § 1643] . . . [and] avoid an interpretation which will make [the CC&Rs] extraordinary, harsh, unjust, inequitable or which would result in absurdity.'" (*Battram v. Emerald Bay Community Assn.* (1984) 157 Cal.App.3d 1184, 1189.) "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean. For this reason, evidence of such conduct . . . is admissible to resolve ambiguities in the contract's language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.)

"Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties." (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444-445.)

There is no doubt the 1985 CC&R's evidence the intent of the Emerald Bay members to restrict development in Emerald Bay to a sole, single family residence per "Lot" or "Parcel." Article III, section 2 of the CC&R's states, "All Lots and Parcels . . . shall be used and occupied only for private residential purposes to accommodate only one private Single Family." Schedule A of the CC&R's provides, "Improvements to each Lot or Parcel in said Tract are restricted to one private Single Family residence and garage . . . ." As if this intent was not clear enough, Schedule A also proves the rule by allowing specific exceptions, i.e., allowing lot 9 to include two

single family residences and other specified lots to include cabanas. In accordance with the interpretive principles set forth above, the CC&R's must be interpreted to fulfill the expressed goal of maintaining a homogenous community of one single family residence per "Lot" or "Parcel."

Nevertheless, the recognition of this general purpose of the CC&R's does not resolve the interpretive question presented. The CC&R's define "Parcel" as "a Parcel so designated as shown on the original Tract Map recorded in the office of the County Recorder legally described by metes and bounds, *and/or a Parcel legally created in accordance with the Subdivision Map Act of the State of California*." (Italics added.)

The highlighted language must mean something, and the parties' various incantations of interpretive rules (e.g., strictly construe limitations on alienation, or follow the CC&R's instruction that they be "liberally construed") are of limited assistance. The Renezeders argue the definition of "Parcel" refers only to Parcels *created* (past tense) before the recordation of the CC&R's in 1985. The Association contends the highlighted language suggests Association members owning a property large enough to divide and create two separate "Parcels" under the Subdivision Map Act can thereby obtain the right to build two single family residences where only one once stood. We agree with the Association's interpretation as the most reasonable construction of the CC&R's as a whole. Members may only build one single family residence per "Lot" or "Parcel," but new "Parcels" may be created in accordance with the Subdivision Map Act.

The Renezeders argue the doctrine of practical construction requires a contrary interpretation, in that the Association and its members lived for 16 years with the 1991 architectural regulation. However, the Association buckled to McCaffrey in 1991 when he challenged in a lawsuit the Association's interpretation that the CC&R's did not allow division of "Lots" or "Parcels." There is no evidence a member tried to subdivide a property between 1991 and 2005 or that the Association succeeded in

blocking a member from subdividing a property during that span of years.[6] And the Association again ultimately gave in to the Gotschalls and Filanc upon close examination of the 1985 CC&R's.

The historical, pre-1985 evidence is also inconclusive as to whether subdivision of properties should be allowed under the 1985 CC&R's. The Renezeders point out that, beginning in the 1930's, the CC&R's have been amended on two occasions (in 1933 and 1948) to specifically authorize multiple single-family residences on certain specified "Lots." But these historical facts cut both ways. Even if it is generally true multiple single family residences could not be built on what were originally considered single properties at Emerald Bay, because exceptions have been made throughout the history of the Association it is not unfathomable that the 1985 CC&R's were intended to provide an exception to those able to legally subdivide their properties into two "Parcels."

The Renezeders warn this result "will allow virtually any speculator to divide Emerald Bay properties into any number of buildable sites in contravention of the intent of the CC&Rs and the Regulation that has governed the community for over 16 years." But our (and the Association's) interpretation of the 1985 CC&R's will not result in such an inequitable and absurd result.

First, as is evident from reviewing the plat map attached as an appendix to this opinion, few of the Emerald Bay properties (at least in the Renezeders' tract) are large enough to secure approval from Orange County to create two new parcels. "No lot or parcel that results from the division of a larger parcel can be sold or leased by the subdivider without compliance with the Subdivision Map Act. A division of land can be

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[6] The record is unclear with regard to what occurred in 1993, when a property owner named Harty applied to the board for permission to effect a lot line adjustment. The board minutes state: "The Board accepts the lot line adjustment as long as it is in conformance with the CC&R's."

accomplished only by the recordation of a final approved subdivision map or parcel map." (9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25.12, p. 56.) The Subdivision Map Act (Gov. Code § 66410 et seq.) vests "[r]egulation and control of the design and improvement of subdivisions" in local agencies, including Orange County. (Gov. Code, § 66411.)

The trial court took judicial notice of Orange County Code sections pertaining to zoning requirements applicable to Emerald Bay; these ordinances establish a minimum parcel size of 7,200 square feet for the R-1 zone applicable to Emerald Bay. (See Orange County Code, §§ 7-9-74, 7-9-74.8.) The split of 109 Emerald Bay into 107 Emerald Bay and 109 Emerald Bay resulted in two properties in excess of 9,000 square feet. The Filanc property contained approximately 14,648 square feet, and the proposed split was intended to create properties of 7,244 square feet and 7,403 square feet. Absent zoning changes, the Renezeders' professed fears could not come to pass.

Second, the amendment of the CC&R's earlier this year to clearly and unambiguously prohibit further divisions of "Lots" and "Parcels" shows something can be done to stop further subdivision if the members desire. This amendment does not affect our interpretation of the 1985 CC&R's as applied to this case, but the amendment does illustrate that the Association and its members were not helpless to prevent additional divisions of properties. The 1985 CC&R's preserved the character of Emerald Bay by limiting construction to single family residences (as opposed, for instance, to duplexes, townhouses, or apartment buildings) and blocking most members abilities' to increase the number of residences within Emerald Bay. The current CC&R's (including the 2009 amendment) completely bar all members from splitting properties and adding to the number of residences by doing so.

In light of our interpretation, the board's action in unilaterally rescinding (without waiting for member participation in making changes to the operating rules as required under section 1357.130) the 1991 architectural regulation was justified. "[A]n

association may not exceed the authority granted to it by the CC&R's. Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance." (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 628 [holding association did not have authority to bar nonresident member from using common areas and noting an association must amend its CC&R's to address circumstances not adequately covered by the CC&R's]; *Ticor*, *supra*, 177 Cal.App.3d at pp. 732-734 [association lacked authority to increase setback requirements beyond those specifically provided in CC&R's].) Judicial deference to board decisions does not extend to decisions "outside the scope of its authority under its governing documents." (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1122 (*Ekstrom*).) The 1991 architectural regulation was not consistent with or authorized by the CC&R's, and was therefore void.

Attorney Fees

The court awarded attorney fees to the Association, but denied such fees to the interveners. The interveners claim they were prevailing parties in the action and are therefore entitled to have their attorney fees paid by the Renezeders (both the Gotschalls and Filanc hired separate counsel). Indeed, the judgment actually refers to the interveners (and the Association) as "prevailing part[ies]." An attorney fee award is ordinarily reviewed for an abuse of discretion. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.)

The parties do not present, and we have not found, any determinative authority to answer the question of whether, and in what circumstances, an intervener is entitled to attorney fees in a declaratory action to interpret CC&R's or an association's operating rules. Perhaps this is because of the somewhat unorthodox nature of the Renezeders' lawsuit. The declaratory relief action filed by the Renezeders was, as a

practical matter, triggered by the Gotschalls purchase and attempted development of the subdivided property next door to the Renezeders. The Renezeders could have enforced the CC&R's directly against the Gotschalls (and, for that matter, Filanc). (§ 1354, subd. (a).)[7] But neither the Gotschalls nor Filanc are specifically mentioned in the complaint, and the prayer for relief does not request any specific action directed toward the Gotschalls, Filanc, or any other particular member. The interveners' claim to attorney fees would have been easier to resolve had the Renezeders sued the Gotschalls and Filanc to enforce the CC&R's against them. (See, e.g., *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1364, 1381 [prevailing defendant, an association member, was entitled to have attorney fees paid by plaintiff member suing to enforce CC&R's].)

Instead, the Renezeders' lawsuit is tailored to forcibly change the Association's interpretation of its CC&R's (including the Association's conclusion that its architectural regulation was inconsistent with the CC&R's), and to enjoin the Association to prospectively abide by the Renezeders' interpretation of the CC&R's. Association members may, at least in some circumstances, bring suit against an association to prompt the association to enforce CC&R's without joining as parties the members who are allegedly violating the CC&R's. (See *Ekstrom*, *supra*, 168 Cal.App.4th at pp. 1126-1127.) In *Ekstrom*, plaintiffs successfully obtained a judgment ordering the association to enforce particular CC&R's, which pertained to the removal of trees obstructing members' views. (*Id*. at pp. 1113-1114.)

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[7] On the other hand, an individual owner is not authorized to enforce "[a] governing document other than the declaration" against a fellow owner, only against the association. (Civ. Code, § 1354, subd. (b).) This explains why the Renezeders opted to sue the Association; the Renezeders may not enforce an operating rule (such as the 1991 architectural regulation) directly against fellow members. It does not explain why the Renezeders opted not to sue the Gotschalls along with the Association.

Interveners claim they were required to join the action to protect their legal rights in case the Association did not adequately advocate in favor of the interveners' preferred interpretation of the CC&R's. "However, the interests of an intervener are relevant only to its right to intervene, and have absolutely no relevance to its right to attorney's fees, absent statutory or contractual rights thereto." (*Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363, 386.)

The contract (the CC&R's)[8] does not authorize attorney fees for interveners. The CC&R's provide: "In any action brought either by the Association or against the Association, where final judgment is rendered in favor of the Association, the Association shall, in addition to such damages as are allowed by the Court, be entitled to all costs incurred by said action, including court costs, expert witness fees, and reasonable attorneys' fees for the attorneys acting on behalf of the Association, as determined by the Court. In the event the Association does not prevail in said action, the prevailing party shall be entitled to such costs and attorneys' fees." The Association was a prevailing party in this action and was properly awarded attorney fees by the court. The CC&R's do not authorize an attorney fee award against one association member in favor of another association member.

The closer question is whether section 1354 allows interveners to recover their attorney fees. Section 1354, subdivision (c), states: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." The Renezeders sought declaratory relief concerning the meaning of the CC&R's, and injunctive relief ordering the Association to conduct its affairs in accordance with the CC&R's as properly interpreted. This is an action to enforce the

[8] Section 1717 authorizes private agreements to award attorney fees to the victor in litigation.

Association's governing documents under section 1354. (See *Chee, supra,* 143 Cal.App.4th at p. 1381.)[9]

Section 1354, subdivision (c), does not explicitly mention interveners as possible beneficiaries of the attorney fees rule. But by virtue of their intervention in the action, interveners became parties. (Code Civ. Proc., § 387, subd. (a) ["An intervention takes place when a third person is permitted to become a party to an action"].) Moreover, the interveners received declaratory relief in their favor (the court specifically agreed they had validly subdivided their properties) and were referred to as prevailing parties by the court in the judgment. Furthermore, as noted above, interveners could easily have been named as defendants by the Renezeders; had that occurred, the Renezeders would have been entitled to attorney fees under section 1354, subdivision (c), because they would have successfully defended against an attempt by the Renezeders to enforce the CC&R's against them.

Courts interpret section 1354, subdivision (c), to require an analysis of whether a party "prevailed on a practical level." (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.) Interveners prevailed on a practical level. Interveners claim they would have been faced with adverse treatment from the Association had the Association lost the declaratory relief action. Interveners' property subdivisions had already been approved by the time judgment was reached in this action. But the complaint sought injunctive relief from the court barring development of new residences on property subdivided in contravention of the alleged meaning of the CC&R's. Had the Association lost this action, it is probable interveners would have faced adverse consequences from the declaratory and injunctive relief provided to the Renezeders.

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[9] We disagree with the court's order to the extent it suggests either that the Renezeders did not bring an action to enforce the CC&R's or that the defense of an action brought to enforce the CC&R's does not entitle a prevailing defendant to attorney fees.

We also, however, agree with the court's apparent concern that "massive and unfair attorney[] fees awards" could result if unlimited interveners are permitted to obtain attorney fee awards following an action by an association member against a homeowner's association. Only "reasonable" attorney fees may be recovered under section 1354, subdivision (c). As the court recognized, it would be unreasonable to award attorney fees to interveners' respective attorneys for duplicative work. (Cf. *Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397, 1407 ["Interveners . . . may be denied fees under the private attorney general doctrine where their participation was unnecessary in light of the efforts of other 'prevailing' litigants"].)

The court abused its discretion in finding section 1354, subdivision (c), to be inapplicable to the interveners under the circumstances of this case. The court did not actually find all of the interveners work was duplicative or otherwise unreasonable, but instead found the interveners were legally barred from obtaining an attorney fee award. Thus, we reverse the court's order denying attorney fees to the interveners, but remand with a reminder that interveners may not recover fees from the Renezeders for duplicative work product or otherwise unreasonable fee requests.

DISPOSITION

The judgment is affirmed. The postjudgment order denying attorney fees to interveners is reversed. The Association and interveners shall recover their costs on appeal.

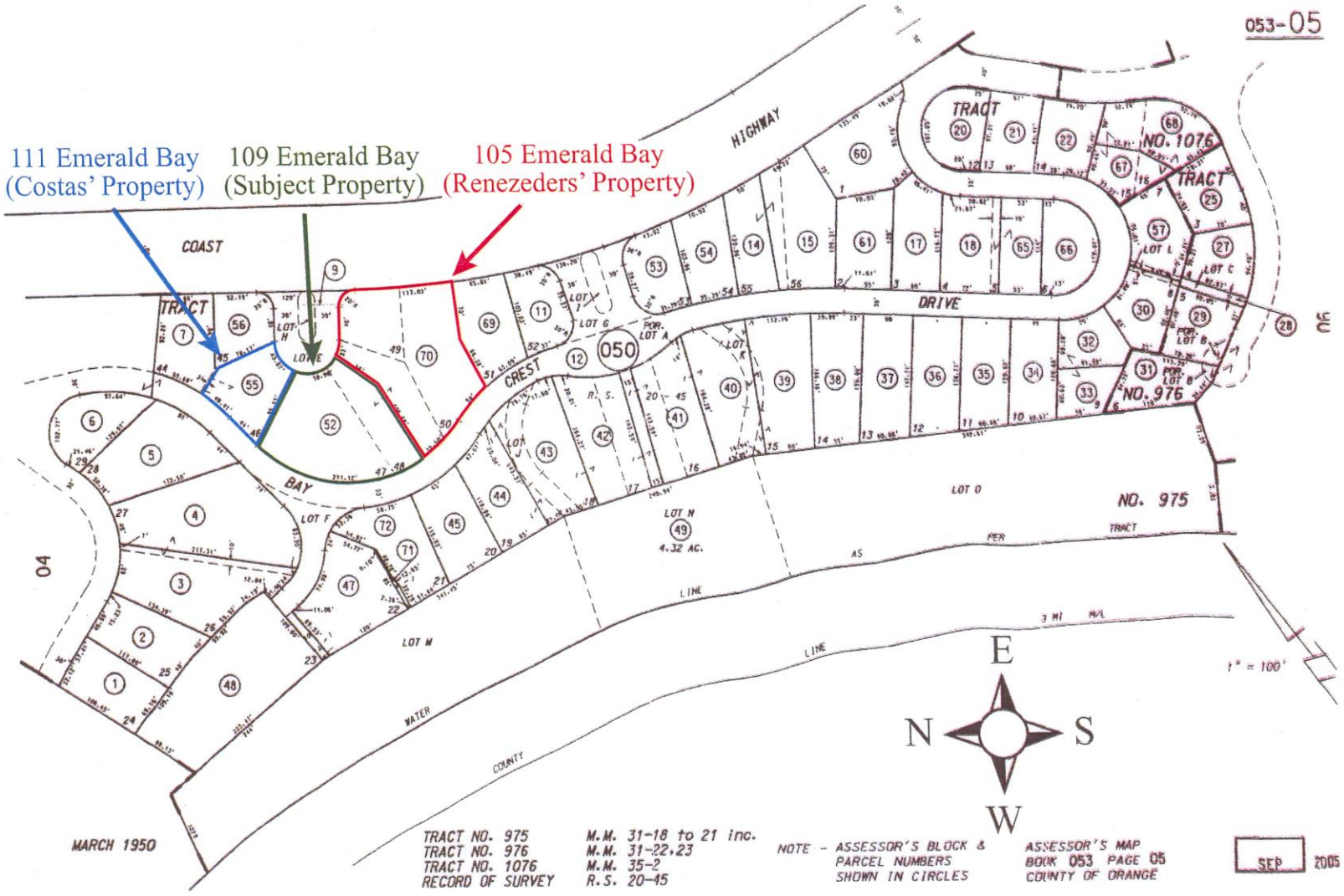
IKOLA, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

109 EMERALD BAY (SUBJECT PROPERTY) - PRE-LOT SPLIT



109/107 EMERALD BAY (SUBJECT PROPERTY) - POST-LOT SPLIT